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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FATHER FLANAGAN'S BOYS HOME, Plaintiff and Appellant, v. MORRISON & FOERSTER et al., Defendants and Respondents.	G035251 (Super. Ct. No. 03CC11053) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard O. Frazee, Judge. Affirmed.

Kirtland & Packard, Robert K. Friedl, Robert A. Muhlbach and Scott M. Schultz, for Plaintiff and Appellant.

Caldwell, Leslie, Newcombe & Pettit, Christopher G. Caldwell, Robyn C. Crowther and Michael D. Roth, for Defendant and Respondent Morrison & Foerster.

Father Flanagan's Boys Home (Flanagan) appeals from a judgment entered after the court sustained Morrison & Foerster's demurrer to its first amended complaint for legal malpractice. The court had previously decided to treat Morrison & Foerster's motion for summary judgment on the initial complaint as a motion for judgment on the

pleadings, and granted that motion with leave to amend. After Flanagan filed its amended complaint, Morrison & Foerster demurred, successfully arguing the new factual allegations added in the first amended complaint did not "relate back" to the filing of the original complaint, and were barred by the statute of limitations.

Flanagan contends the court erred, both in granting a motion for judgment on the pleadings in the first instance, and in sustaining the demurrer. We conclude that Flanagan is correct with respect to the first issue, because its initial complaint does state a cause of action, albeit one which alleges causation in the most cursory way. Unfortunately for Flanagan that cursory allegation was not supported by any evidence in opposition to the motion for summary judgment. Consequently, we conclude Morrison & Foerster should have been awarded summary judgment in the first instance, and affirm the judgment.

* * *

We sometimes see lawsuits by disgruntled clients who are disappointed when they lose a lawsuit and blame their attorney. But it is a rare client who pursues his attorney all the way to the appellate court after *winning* two lawsuits. That is what is buried beneath the procedural morass that is this case.

Flanagan filed its original complaint in September of 2003. The complaint purported to state two causes of action – for "legal malpractice" and "breach of fiduciary duty/constructive trust" – but both were based upon the same asserted act of wrongdoing and alleged the same damages.

Flanagan, a Nebraska corporation, alleged that it retained Morrison & Foerster in 1987, for the purpose of advising it concerning compliance with California wage and hours laws. Flanagan anticipated establishing a residential care facility for troubled youth in Orange County, California, and wished to ensure that its treatment model, in which employees known as "family teachers" resided 24 hours per day with the

youth in residential settings, could be operated in a manner consistent with California requirements.

Pursuant to Morrison & Foerster's advice, an application was made to the California Division of Labor Standards Enforcement, seeking an "exemption permit" to excuse Flanagan from the obligation of keeping specific records under "Wage Order 5-80." The exemption allegedly "permitt[ed Flanagan] to avoid the Wage Order's overtime pay requirements." Pursuant to applications submitted by Morrison & Foerster, the Division of Labor Standards Enforcement issued annual exemption permits, beginning in 1987 and extending to March 31, 1995.

Flanagan began operating its Orange County facility in May of 1994. Although Morrison & Foerster was retained to maintain the exemption permit in effect, it neither advised Flanagan that the latest permit issued was due to expire in March of 1995, nor did it prepare or submit an application for renewal of the permit in either 1995 or 1996. Morrison & Foerster did prepare an application for the exemption in 1997, but did not submit it.

In August of 1998, a representative of Flanagan contacted Morrison & Foerster, and it subsequently prepared and submitted a renewal application for 1998. Morrison & Foerster did not, however, follow up to ensure the application had been approved, and never advised Flanagan as to its status. Morrison and Foerster prepared an additional renewal application in January of 2000.

As a result of Morrison & Foerster's conduct, Flanagan was allegedly "exposed to possible overtime claims from its Family Teacher employees. In January of 2001, a Family Teacher couple, the Clarks, filed such a claim in Orange County, California, for overtime compensation in the amount of $298,514.08 for the time period of September 28, 1998 through August 18, 2000; and in February of 2002, Family Teacher David. A. White filed such a claim for overtime compensation in the amount of $179,541.45 for the time period of July 21, 1997 through March 13, 2001."

Flanagan retained Morrison & Foerster to defend it against the Clarks' claim, and while a Labor Commissioner found in the Clarks' favor, that award was overturned by a superior court judge. However, Flanagan allegedly "incurred costs and attorneys' fees in excess of $300,000.00 to defend itself against the Clarks' claim in Orange County, California. Plaintiff will also incur attorneys fees and costs in the defense of White's claim, as well as possibly face an adverse ruling on the merits of the claim."

Flanagan alleged that Morrison & Foerster "knowingly failed to timely file annual applications for exemption after 1994, and otherwise failed to discharge their professional obligations with the result that [Flanagan] is exposed to claims that it did not comply with California wage and hour laws. The exemption scheme [Morrison & Foerster] advised and counseled [Flanagan] to subject itself to was not maintained following the expiration of the last permit on March 31, 1995 and [Flanagan] was not so notified by [Morrison & Foerster.] As a result of said failure, [Flanagan] lost its exemption and was exposed to liability for overtime claims. The Clarks' claim and the resultant attorneys' fees expense came about as a direct and proximate result of the defendants' advise [*sic*] and failure to timely file applications for exemption as referenced above, as will any such expense arising from appeals and other claims such as the White claim."[1]

Flanagan alleged that in doing the acts described, Morrison & Foerster "failed to exercise reasonable care and skill" and that "[a]s a result of said failure to use reasonable care and skill, [Flanagan] was required to expend over $ 300,000.00 in attorneys' fees and expenses to defend a claim which, if appropriate advice had been given and/or an appropriate exemption application had been filed, would either never

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[1] Flanagan did not, however, allege that any damages had yet been suffered in connection with *White's* claim.

have been asserted against [Flanagan] or had it been asserted, would have been summarily subject to dismissal based on the exemption in question."

Flanagan's second "cause of action," labeled as one for "breach of fiduciary duty/constructive fraud," was also based upon Morrison & Foerster's alleged failure "to advise [Flanagan] in a timely manner that (1) the application for exemption which was to be made in 1995 was not made; and, (2) failing to advise [Flanagan] in 1995 and thereafter that said failure to file application(s) for exemption or take such other reasonable and appropriate actions to obtain the exemption permits would result in loss of said exemption and exposure for potential overtime claims."

Morrison & Foerster answered the complaint, and in July of 2004, it filed a motion for summary judgment, or alternatively for summary adjudication of each of the two "causes of action." Morrison & Foerster argued summary judgment should be granted because the complaint was barred by the applicable statute of limitations, and because Flanagan could not establish that the conduct complained of caused damages.

In support of its motion, Morrison & Foerster offered evidence that the labor commissioner had opined, in 1987, that the "family teachers" employed by Flanagan would be "covered" by Order 5-80. Consequently, it worked out a plan, in conjunction with the Department of Labor Standards Enforcement, to implement Flanagan's residential "family teacher" concept in conformity with California's wage and hour laws. That plan had two components. One component was the exemption permits, but those permits were not intended to either excuse compliance with the overtime law or establish that Flanagan's family teachers were exempt employees. Instead, the permits merely excused Flanagan from the requirement of *maintaining records to document the specific hours worked* by its family teachers.

The other component of the plan required Flanagan to execute written compensation agreements with each of its family teachers, including language approved by the Department of Labor Standards Enforcement specifying that the nature of the

family teachers' work made it difficult to clearly distinguish between work and personal time. Consequently, it was agreed that the family teachers' salary, room and board constituted their entire compensation for all hours worked. Flanagan's general counsel understood that while those components, together, would not guarantee Flanagan would never be sued for overtime compensation, they would operate as a defense to such a claim in the event it was asserted.

According to Morrison & Foerster's evidence, however, Flanagan failed to execute the written compensation agreements with either the Clarks or White.[2] Moreover, the claims asserted by the Clarks and White made no reference to Flanagan's failure to maintain its exemption from the record keeping requirements. To the contrary, the Clarks asserted that Flanagan actually did require them to keep time sheets documenting their work hours, and both the Clarks and White relied upon such time sheets to document their claims for overtime compensation.

Based upon that evidence, Morrison & Foerster argued Flanagan could not establish that its alleged failure to obtain renewed exemptions from the record keeping requirement had in any way "caused" the Clarks or White to file their claims for overtime compensation.

Flanagan opposed the summary judgment motion, but not on the basis Morrison & Foerster's alleged failure to maintain the exemption permits had caused its damage. Instead, it argued triable issues of fact existed regarding "whether [Morrison & Foerster's] recommendation that [Flanagan] seek an exemption to the record-keeping requirements of Wage Order 5-80 . . . fell below the standard of care." According to Flanagan, that initial malpractice was then "compounded" by Morrison & Foerster's failure to maintain the exemption permits.

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2 Morrison & Foerster supported that allegation with evidence that both the Clarks and White each filed certified complaints with the Labor Commissioner alleging they were employed by Flanagan's pursuant to an "oral" agreement.

Flanagan explained that the entire plan devised by Morrison & Foerster to bring Flanagan's "family teacher" concept in compliance with California law was "highly problematic and simply did not accomplish the goal [Flanagan] set out to achieve in retaining [Morrison & Foerster] . . . . To begin with, the scheme did not exempt [Flanagan] from California's requirement to pay its employees, including 'Family Teachers' overtime. . . . [I]t did not provide [Flanagan] with a viable defense from claims by 'Family Teachers' for overtime pay. . . . [I]t exposed [Flanagan] to liability for claims for overtime pay by any 'Family Teacher' who sought to bring such a claim. . . . [And] the scheme required constant administration and monitoring that was difficult to accomplish and confusing." Flanagan argued Morrison & Foerster breached a duty to advise it that "alternative methods were available for [Flanagan] to *truly* comply with California wage and hour laws with respect to "Family Teachers" that did not entail the need to seek and obtain yearly permits that might not be renewed, were burdensome to maintain and only exempted [Flanagan] from the requirement to keep records of hours worked and not from the requirement to pay overtime."

Flanagan supported these latter contentions with a declaration of an attorney who specialized in employment litigation. In that declaration, the attorney merely restates, in similarly conclusory terms, the contentions outlined in Flanagan's opposition. He critiques the plan devised by Morrison & Foerster on the basis that it did not "exempt" Flanagan from the requirement it pay overtime to employees, and that it required "constant administration and monitoring . . . ." He also asserted Morrison & Foerster had an obligation to advise Flanagan that available alternatives would have allowed it to "truly" comply with California's wage and hour laws – but without identifying what those "alternatives" were. And he opined that Morrison & Foerster's recommendation of its plan "cannot be excused by the fact that [Flanagan] *may have believed it understood the risks* the scheme involved." (Italics added.)

With respect to the specific claim that Morrison & Foerster had failed to maintain the exemption permits, Flanagan offered neither evidence nor argument that this caused its alleged damages.[3] To the contrary, Flanagan asserted, as an "additional undisputed material fact" that the attorney representing the Clarks' in their underlying wage claim "would have pursued the Clarks' claim even if a permit exempting [Flanagan] from the record-keeping requirements of Wage Order 5-80 had been in place . . . ." Flanagan also asserted that the Clarks' attorney did not believe their employment situation fell within the parameters of Wage Order 5-80, and that the circumstances of their employment entitled them to collect overtime.

In its reply, Morrison & Foerster objected to Flanagan's attempt to insert a new theory of liability, not included in the complaint, as a basis for defeating summary judgment. It pointed out that the complaint had very specifically pinned liability upon its alleged failure to maintain the exemption permits, and had not included any allegation that it had breached its duty of care in formulating the plan it had worked out with the Department of Labor Standards Enforcement.

At the hearing on the summary judgment motion, the court announced "I'm going to rule on this matter . . . and it's going to be a motion for judgment on the pleadings, okay? And I'm going to grant it with leave to amend. . . . I agree with the moving party, they filed a motion for summary judgment but, rather than grant that and throw you out of court, okay, because you raised issues in your opposition that you didn't raise in your pleadings, you're going to be able to amend your pleadings and get the case focused . . . .[¶] . . . [¶] So, the court is determining that the motion for summary judgment that was filed [is] a motion for judgment on the pleadings . . . under *Taylor v.*

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3 Rather, it merely emphasized that Morrison & Foerster had not made any attempt to dispute that the failure "fell below the standard of care." And that is true, as far as it goes. What Morrison & Foerster did do, however, was dispute Flanagan's allegation that it had ever undertaken the responsibility for maintaining the permits. Then, acknowledging such a factual dispute would preclude summary judgment on that issue, Morrison & Foerster moved on.

Lockheed-Martin Corporation [(2000)] 78 Cal.App.4th 472. Because the appellate courts really want matters tried on their merits."

When Flanagan attempted to persuade the court that its new theory of liability had already been reflected in its discovery responses, the court stated "I'm going to allow you now to bring them into your pleadings, okay? [¶] . . . [¶] Not just an answer to a deposition or an answer to an interrogatory. [¶][¶] That's throwing new theories in. That isn't good enough. You've got to bring it into the case." The court "assume[d]" Morrison & Foerster would file another summary judgment motion after the amended complaint was filed, and re-scheduled pending dates accordingly.

On November 8, 2004, Flanagan filed its first amended complaint. That complaint alleged that Morrison & Foerster had first advised it that the "family teacher" employees "were governed by Wage Order 5-80 . . . then recommended that [Flanagan] seek an exemption to the record-keeping requirements of Wage Order 5-80, and at the same time have Family Teachers execute written agreements wherein they acknowledged that their annual salaries, room and board, would constitute all the pay they were entitled to receive . . . ." Morrison & Foerster also allegedly advised Flanagan that this plan "would relieve [it] of the obligation to compensate Family Teachers at overtime rates and of any other requirements of the Industrial Welfare Commission orders that pertain to overtime and minimum wage, and that [Flanagan] should be immune from any claim for failure to pay overtime or minimum wage . . . ."

However, Morrison & Foerster's plan allegedly failed to achieve goals intended (for the reasons set forth in Flanagan's earlier opposition to the summary judgment motion), and fell below the standard of care for attorneys. Morrison & Foerster also acted below the standard of care in failing to advise Flanagan that its plan would not relieve Flanagan of liability from the obligation to pay overtime compensation, and in failing to inform Flanagan that "alternative methods were available for [Flanagan] to truly comply with California wage and hour laws with respect to Family Teachers in

ways that did not entail the need to seek and obtain yearly permits that might not be renewed, were burdensome to maintain and only exempted plaintiff from the requirement to keep record of hours worked and not from the requirement to pay overtime." And finally, Flanagan renewed its claim that Morrison & Foerster's "subsequent failure to renew and otherwise maintain the exemption permit" also fell below the standard of care.

Rather than file another summary judgment motion, Morrison and Foerster demurred to the amended complaint, and moved to strike the allegations pertaining to its alleged failure to maintain the exemption permits in effect. It argued that Flanagan's allegations reasserting malpractice based upon the "exemption renewal" issue were improper, as that claim had already been disposed of by the court's prior order granting judgment on the pleadings. Morrison & Foerster also asserted Flanagan's new theory of liability was a "sham amendment" because it was based upon allegations which were inconsistent with and contradicted the prior pleading. Finally, Morrison & Foerster asserted the new theory of liability did not "relate back" to the filing date of the original complaint, and was barred by the applicable statute of limitations.

Flanagan opposed the demurrer and motion to strike. It contended it was entitled to re-plead the claim asserted in its original complaint, as the court had never ruled it was "unsupported by the evidence," and asserted that its newly pleaded theory was not only consistent with its prior pleading, but actually included in a careful reading of it.

The court sustained Morrison & Foerster's demurrer without leave to amend. It explained that the allegations in the first amended complaint pertaining to the maintenance of the exemption permits "are substantially the same as those contained in plaintiff's original complaint. The court has already issued a judgment on the pleadings with respect to those allegations which the court finds are unsupported. Additionally, the new allegations in plaintiff's first amended complaint relating to the defendant's alleged negligence in 1987 are time barred . . . ."

I

Initially, we agree that the trial court, in theory, could choose to treat the first motion for summary judgment like a motion for judgment on the pleadings, as explained in *Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472. As explained in *Taylor*, "[w]hen a motion for summary judgment challenges the sufficiency of the pleadings rather than the evidence supporting the allegations contained therein, it is tantamount to a motion for judgment on the pleadings and may be treated as such by the trial court. (*Hand v. Farmers Ins. Exchange* (1994) 23 Cal.App.4th 1847, 1853.) The practical effect of this procedure is that in granting judgment on the pleadings, the trial court may give the plaintiff the opportunity to amend the complaint even when no motion to amend has been filed. (*See Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 216; *Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 647.)" (*Taylor v. Lockheed Martin Corp., supra,* 78 Cal.App.4th at p. 479.) However, as also explained in *Taylor,* the procedure is "incorrect [if] extrinsic evidence was needed to establish . . . essential facts supporting the ruling . . . ." (*Ibid.*) In other words, the court can only treat the motion as one for judgment on the pleadings, and grant that motion, if the pleading itself was defective.

Flanagan argues the court erred in this case because the pleading itself was *not* defective. We agree. The trial court's comments make clear it believed Morrison & Foerster's motion for summary judgment was well-taken. As the court explained to Flanagan: "You're going to have plenty of time to amend *because I agree with the moving party*, they filed a motion for summary judgment but, rather than grant that and throw you out of court . . . you're going to be able to amend your pleadings and get the case focused." (Italics added.)

What the court did not do, however, is explain the manner in which Flanagan's *pleading*, as opposed to its *proof*, fell short. "The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such

skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. [Citations.]" (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200.) Flanagan's complaint included all of those elements.

According to the complaint, Morrison & Foerster was retained to investigate and advise Flanagan as to the best manner in which it could comply with California wage and hour laws in connection with "family teacher" employees. As part of its representation of Flanagan, Morrison & Foerster then undertook the duty of applying for and obtaining annual "exemption permits" on Flanagan's behalf, which "had the effect of permitting [Flanagan] to avoid . . . overtime pay requirements." The last permit expired in March of 1995, and Morrison and Foerster thereafter failed to either advise Flanagan of the expiration, or to comply with its obligation to apply for a new exemption. Morrison & Foerster's failure to either maintain the exemptions in effect, or to advise Flanagan of the need to do so, constituted a failure to exercise reasonable care and skill in the performance of its legal services. Those allegations establish the elements of duty and breach.

The complaint alleged causation as follows: "The exemption scheme [Morrison & Foerster] advised and counseled [Flanagan] to subject itself to was not maintained following the expiration of the last permit on March 31, 1995 and [Flanagan] was not so notified by [Morrison & Foerster.] As a result of said failure, [Flanagan] lost its exemption and was exposed to liability for overtime claims. The Clarks' claim and the resultant attorneys' fees expense came about as a direct and proximate result of the defendants' advise [*sic*] and failure to timely file applications for exemption as referenced above, as will any such expense arising from appeals and other claims such as the White

claim."[4] The complaint goes on to allege: "if appropriate advice had been given and/or an appropriate exemption application had been filed, [the Clarks' claim] would either never have been asserted against [Flanagan] or had it been asserted, would have been summarily subject to dismissal based upon the exemption in question."

And Flanagan alleged its damages were the "costs and attorneys' fees in excess of $300,000.00 [it had already incurred] to defend itself against the Clarks' claim. . . ." No damages were actually alleged in connection with the White claim.

As Flanagan contends, these allegations are sufficient to state a cause of action on a theory of legal malpractice. Of course, Flanagan also asserts the complaint stated a separate cause of action for "breach of fiduciary duty/constructive fraud," but we cannot agree. That latter claim, based as it is on the same alleged duty, breach, causation and damages as the malpractice claim, rests on the same "primary right," and the two claims taken together constitute but one "cause of action." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904, citing *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682 .)

Flanagan is also correct that the trial court could not have based its order granting judgment on the pleadings on a theory that the statute of limitations barred Flanagan's claim – the only other ground raised in Morrison & Foerster's summary judgment motion. Flanagan expressly alleged in its complaint that Morrison & Foerster "have had a continuing attorney/client relationship with plaintiff – from the advise [*sic*] and counsel on how to best comply with California wage and hour laws, to the applying for exemptions referenced above, to the resultant claim by the Clarks and White. This continuing attorney/client relationship has existed up to and including the date of the filing of this complaint." Code of Civil Procedure section 340.6, subdivision (a), which governs the statute of limitations against attorneys for wrongful acts or omissions,

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[4] See footnote 1, *ante.*

provides that while the normal limitation period for such an action is one year after plaintiff knew or should have known of the facts constituting the wrong, "that the period shall be tolled during the time . . . . [¶] . . . [¶] (2) . . . [t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred . . . ." (*Id.*, subd. (a)(2).)

But that's where Flanagan stops winning on this issue. Because our conclusion that the court could not properly treat Morrison & Foerster's motion as one for judgment on the pleadings means the court was obligated to treat it as what it was: *a motion for summary judgment.*

As also explained in *Taylor v. Lockheed Martin Corp., supra,* 78 Cal.App.4th at p. 479, if the trial court elects to treat the summary judgment motion as a motion for judgment on the pleadings, but then improperly relies upon extrinsic evidence in granting the motion, the appellate court may treat the order as one granting summary judgment and review it de novo. In this case, the only way to determine Morrison & Foerster was entitled to judgment on the original complaint was by considering the *evidence submitted in connection with the causation element.* As the trial court later acknowledged, that is exactly what it had done: "The allegations in plaintiff's first amended complaint relating to the renewal of the 1995 [exemption permit] are substantially the same as those contained in plaintiff's original complaint. The court has already issued a judgment on the pleadings with respect to those allegations *which the court finds are unsupported*." (Italics added.)

In that regard, the court was correct: In support of its summary judgment motion, Morrison & Foerster introduced evidence demonstrating that the "exemption permits" did not actually "permit[] [Flanagan] to avoid . . . overtime pay requirements," as the complaint alleged, but only to avoid record-keeping requirements relating to the hours its "family teachers" worked. Morrison also offered evidence suggesting that the overtime claims filed by the Clarks and White were unrelated to any lapse in maintaining

the exemption permits, which was the sole "cause" of the damages alleged in the complaint.[5] Flanagan, in its opposition to summary judgment, not only failed to contradict that evidence, but it affirmatively asserted, *as an undisputed fact*, that the Clarks' counsel would have pursued their claim – the only one which allegedly resulted in actual damages – regardless of the status of those permits.[6]

Based upon the undisputed evidence that the sole acts of malpractice Morrison & Foerster was alleged to have committed (i.e., the failure to advise Flanagan that its exemption permit had expired, and the failure to renew that permit) did not actually cause the damages alleged in the complaint, Morrison & Foerster was entitled to have summary judgment entered in its favor. "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).)

Flanagan does argue, of course, that its original complaint contained language which was sufficiently broad to encompass the allegation that Morrison & Foerster's initial advice regarding the utilization of the exemption permits was itself negligent. It points to the allegation that Morrison & Foerster "failed to timely file

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5 As set out in the complaint: "The exemption scheme [Morrison & Foerster] advised and counseled [Flanagan] to subject itself to was not maintained following the expiration of the last permit on March 31, 1995, and [Flanagan] was not so notified by [Morrison & Foerster.] *As a result of said failure*, [Flanagan] lost its exemption and was exposed to liability for overtime claims. The Clarks' claim and the resultant attorneys' fees expense came about as a direct and proximate result of the defendants' advise [*sic*] and failure to timely file applications for exemption as referenced above, as will any such expense arising from appeals and other claims such as the White claim." (Italics added.)

6 The complaint alleged only potential future damages in connection with White's claim. "The Clarks' claim and the resultant attorneys' fees expense came about as a direct and proximate result of the defendants' advise [*sic*] and failure to timely file applications for exemption as referenced above, *as will any such expense arising from appeals and other claims such as the White claim.*" (Italics added.) Potential future damages do not constitute part of the cause of action. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 513.)

annual applications for exemption after 1994, *and otherwise failed to discharge their professional obligations* with the result that [Flanagan] is exposed to claims that it did not comply with California wage and hour laws." (Italics added.)

We are not persuaded. For better or worse, Flanagan's original allegations are quite specific, and included the assertion the exemption permits which Morrison & Foerster purportedly failed to maintain would have actually "permitt[ed Flanagan] to avoid the Wage Order's overtime pay requirements." Flanagan expressly alleged that the overtime claims filed by the Clarks and White were the result of two specific failures by Morrison & Foerster: (1) the failure to "maintain" the exemption permits, and (2) the failure to "notify" Flanagan regarding the fact of their expiration. In that context, the generic "otherwise failed to discharge their professional obligations" is most likely a reference to the alleged failure to "notify." In any event, such a generic statement cannot be relied upon to impliedly encompass an entirely separate, and previously unmentioned, theory of liability.

In fact, the theory espoused in Flanagan's amended allegations is diametrically opposed to the theory set forth in its original complaint. In contrast to its original allegation that the exemption permits allowed it to "avoid the Wage Order's overtime pay requirements," Flanagan's new theory claimed just the opposite: i.e., that the plan devised by Morrison & Foerster was inherently flawed and ineffective as a means of achieving Flanagan's goal of avoiding liability for overtime pay. Flanagan alleged "the scheme *did not* exempt [Flanagan's] from California's requirement to pay its employees, including Family Teachers, overtime." (Italics added.) One cannot, under the guise of "fleshing out" an allegation, transform it into the opposite of what it stated previously.

Consequently, we conclude that Morrison & Foerster was entitled to have summary judgment entered in its favor based upon the motion it filed seeking that relief. The trial court was without authority to construe the motion as a "motion for judgment on

the pleadings" and grant the motion on that basis, where the flaw in Flanagan's case resided in its proof, rather than in its pleading. Moreover, the court could not properly refuse summary judgment by offering Flanagan "leave to amend" its complaint, where the motion was well-taken as to the facts pleaded, and no such leave had been requested. The court was required to consider the complaint, as it existed, in determining the propriety of summary judgment. (*Lee v. v. Bank of America, supra,* 27 Cal.App.4th at pp. 216-217.) So considered, the motion for summary judgment should have been granted.

II

In any event, we also conclude the trial court subsequently ruled correctly when it determined the distinct allegations of malpractice added into Flanagan's first amended complaint did not "relate back" to the filing of the original complaint, and were thus barred by the statute of limitations.

As we have already explained, Flanagan's original complaint essentially endorsed Morrison & Foerster's plan of utilizing "exemption permits" as a way of ensuring compliance with California's wage and hour laws. That complaint alleged, however, that Morrison & Foerster's malpractice began in 1995, when it failed to maintain those permits in effect, and failed to advise Flanagan concerning the necessity of doing so.

Flanagan's amended complaint, by contrast, asserted that Morrison & Foerster actually committed malpractice *in 1987*, in the conception and recommendation of its flawed plan for Flanagan to utilize the exemption permits as a means of complying with the wage and hour laws. As such, Flanagan's amended complaint asserted a distinct "incident" of wrongdoing. Even if we assume that assertion would have been timely if included in the original complaint (see *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1526, fn.2), it is not timely when asserted more than a year later. As explained by another panel of this court in *Lee v. Bank of America, supra,* 27 Cal.App.4th

197, the allegations of an amended pleading would not be treated as though filed in the original complaint (i.e., they would not "relate back" to the original filing) if they were based upon "different wrongful conduct." (*Id.* at p. 212.) It is irrelevant if the distinct acts of wrongdoing were committed by the same defendant. (*Wiener v. Superior Court* (1976) 58 Cal.App.3d 525, 527-529), or resulted in the same alleged damages (*Espinosa v. Superior Court* (1988) 202 Cal.App.3d 409, 414, citing *Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146, 149-152.)

In *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, the court applied a "relation back" analysis in the legal malpractice context. In *Foxborough*, the plaintiff had sued its former attorney, Van Atta, on a claim that he had committed malpractice in 1979 by failing to secure it an open-ended option to annex certain real property as part of a condominium conversion agreement. Rather than being open-ended as anticipated, the option obtained was governed by statutory provisions which automatically rendered it valid for only a three-year period. The option was lost when that period expired.

In a proposed amendment to the original complaint, the plaintiff asserted that Van Atta had also committed subsequent negligent acts, in the course of: (1) undertaking, in 1985, to help convince the party on the opposite side of the original transaction that it had been responsible for informing the plaintiff of the option's limited duration; and (2) acting, in 1987, as a "consultant" to the attorneys representing plaintiff in subsequent litigation regarding the option.

The appellate court concluded the proposed amendment would not have related back to the filing of the original complaint, and thus the allegations contained therein would be barred by the statute of limitations. "Although both the original and proposed amended complaints refer to the Daon litigation as an injury, they attributed the injury to different incidents. Foxborough originally alleged that Van Atta negligently performed services for the Daon transaction, completed in January 1981, resulting in the loss of annexation rights and the Daon litigation. By contrast, the alleged negligence in

Foxborough's proposed new cause of action would have occurred, at the earliest, in February 1985, when Van Atta's letter to Daon claimed that Daon was responsible for Foxborough's losses. (*Foxborough v. Van Atta*, *supra*, 26 Cal.App.4th at pp. 230-231.)

In this case, as in *Foxborough*, the malpractice allegations added to Flanagan's first amended complaint were entirely distinct, both in time and in content, from the wrongdoing alleged in its original complaint. They consequently did not comprise the same "incident," and did not relate back to the filing of that original complaint. Because that malpractice claim was filed more than one year after the cause of action arose (indeed, more than one year after the original complaint was filed) the court did not err in sustaining a demurrer to those distinct allegations without leave to amend.

Because we have concluded Morrison & Foerster was entitled to summary judgment on Flanagan's original complaint, the judgment later entered in its favor must be affirmed. But even assuming the trial court had acted properly in unilaterally offering Flanagan's the opportunity to "amend" its pleading to assert the distinct incident of malpractice which it had relied upon in its opposition to that summary judgment motion, the judgment would nonetheless be proper. The malpractice claim asserted in Flanagan's first amended complaint did not relate back to the filing of Flanagan's original complaint, and was consequently barred by the applicable statute of limitations,

The judgment is affirmed, and Morrison & Foerster is entitled to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.